

January 8, 2018

VIA EFILING ONLY

Shari Moore
City Clerk
City of St. Paul
310 City Hall
15 W Kellogg Blvd
Saint Paul, MN 55102
cityclerk@ci.stpaul.mn.us

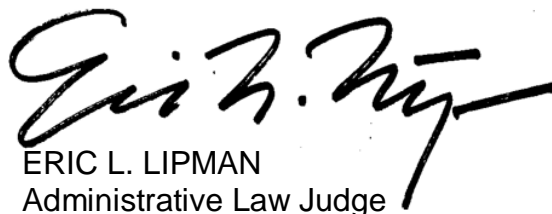
**Re: *In the Matter of the Licenses Held by El Alamo for the Premises at
429 Robert Street South in Saint Paul
OAH 8-6020-34820***

Dear City Clerk Moore:

Enclosed and served upon you is the Administrative Law Judge's **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** in the above-entitled matter. The official record, with the exception of the recording of the hearing, is also enclosed. If you would like a copy of the recording, please contact the Office of Administrative Hearings in writing, by telephone at (651) 361-7881, or by email at Sheena.Denny@state.mn.us. The Office of Administrative Hearings' file in this matter is now closed.

If you have any questions, please contact my legal assistant Sheena Denny at (651) 361-7881 or Sheena.Denny@state.mn.us, or facsimile at (651) 539-0310.

Sincerely,



ERIC L. LIPMAN
Administrative Law Judge

ELL:sd

Enclosure

cc: Therese Skarda
Jeffrey O'Brien

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF SAINT PAUL

In the Matter of the Licenses Held by El
Alamo for the Premises at 429 Robert
Street South in Saint Paul

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

This matter came before Administrative Law Judge Eric L. Lipman for an evidentiary hearing on December 7, 2017. The hearing record closed at the end of the hearing on that day.

Therese Skarda, Assistant City Attorney, appeared on behalf of the Department of Safety and Inspections of the City of Saint Paul (Department). Jeffrey C. O'Brien, Chestnut Cambronne P.A., appeared on behalf of the Licensee, El Alamo.

STATEMENT OF THE ISSUES

1. Did El Alamo violate the minimum conditions of its liquor and business licenses in the summer and autumn of 2017?
2. If so, is the proposed penalty of a \$2,000 fine, and a ten day suspension of El Alamo's city issued licenses an appropriate licensing sanction?

SUMMARY OF CONCLUSIONS

The City demonstrated by a preponderance of the evidence that El Alamo violated the requirements of Saint Paul Legislative Code § 310.06 (b)(6)(a), by failing to adhere to the conditions upon its liquor and business licenses. Specifically, the Department established that El Alamo's agents and staff failed to uphold the requirements of Conditions Number 1, 3, 6 and 8 of those licenses. Because of the number of significant failures to abide by licensing conditions, the Administrative Law Judge concludes that there are substantial and compelling reasons for an upward departure beyond the presumptive penalty of \$1,000.

Based upon the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. El Alamo is the business and trade name of a popular bar on the 400-block of Robert Street in Saint Paul, Minnesota.¹

2. El Alamo, LLC holds a series of business licenses related to the provision of beverages and entertainment in the bar. It holds an on-sale liquor license for 100 seats or less and service of alcohol on Sundays; a limited patio service license; an entertainment license; and a charitable gambling location license.²

3. El Alamo, LLC first obtained a liquor license in March of 2009.³

4. Beginning in mid-August 2013, there was a rise in regulatory problems at the El Alamo site. In August of 2013, the bar failed to pass an alcohol compliance check conducted by city officials.⁴

5. During the first 11-months of 2017, the Saint Paul Police Department responded to 33 calls for service at the El Alamo site. At the evidentiary hearing, Sergeant Robert Stanway segregated these service calls among five categories:

- (a) six of the service calls involved use of a weapon;
- (b) five of the service calls involved an aggravated assault;
- (c) one of the service calls involved a robbery;
- (d) two of the service calls involved an intoxicated person; and,
- (e) 19 of the service calls involved a disturbance of the peace.⁵

6. Both city officials and the staff of El Alamo maintain that they are working diligently to boost regulatory compliance at the El Alamo site and avoid problems arising out of service to El Alamo's patrons.⁶

7. On April 26, 2017, Sergeant Stanway requested a copy of the recording made by El Alamo's video surveillance system for the period between 12:00 a.m. and 1:30 a.m. on Sunday, April 23, 2017.⁷

8. While Harry Erkenbrack, the owner and Chief Operating Officer of El Alamo, timely furnished a video recording to Sergeant Stanway, the time stamps on the recording were not accurate. The time stamp function on El Alamo's video recording

¹ See Exhibits (Exs). 18 and 20.

² Ex. 16.

³ *Id.*

⁴ *Id.*

⁵ Testimony (Test.) of Robert Stanway.

⁶ *Id.*; Test. of Eric Hudak; Test. of Pamela Burn; Test. of Joseph Smith.

⁷ Ex. 13 at 4.

equipment had not been adjusted to reflect the change to Daylight Savings Time that had occurred a few weeks earlier.⁸

9. City officials maintained that the erroneous time-stamps on the recording violated the conditions on El Alamo's liquor and business licenses – specifically, the then-existing version of Condition Number 1. In April of 2017, Condition Number 1 read: "Interior and exterior video surveillance cameras must be operating during all hours the establishment is open. Tapes must be saved for a period of at least 30 days, and the *dates and times of recording must be accurate* and visible on the videotapes."⁹

10. On July 17, 2017, Mr. Erkenbrack, on behalf of El Alamo, and Eric Hudak, Licensing Manager for the City of St. Paul, executed a settlement agreement to resolve the dispute.¹⁰

11. As part of the settlement, the City waived its claim to collect a \$500.00 penalty in return for a revision of Condition Number 1 to El Alamo's liquor and business licenses and the addition of three additional conditions, Condition Numbers 6, 7 and 8.¹¹

12. After the revisions in mid-July 2017, the terms of El Alamo's liquor and business licenses included the following conditions:

[License Condition No. 1:] In accordance with the approved video surveillance plan, licensee will ensure that video surveillance camera system is in good working order, ensure it is recording 24 hours per day, ensure it can produce recorded surveillance video in a commonly used, up-to-date format, and ensure that accurate date and time of day are visible on all recorded video. Licensee will retain surveillance video for a minimum of thirty (30) days. If an incident is deemed serious by [St. Paul Police Department (SPPD)], licensee shall make surveillance video immediately available for viewing by SPPD. If a copy [of] the surveillance video for a serious incident is requested by SPPD, licensee shall have the technology, materials and staff available to immediately make the copy. In all other cases, licensee shall provide a copy of the surveillance video to the requestor within 48 hours.

...

[License Condition No. 3:] Loitering in the parking lot shall not be permitted. The parking lot must be regularly patrolled to insure compliance with this condition.

...

[License Condition No. 6:] The following shall apply to the operation of the side door facing Isabel Street West effective August 20, 2017. Door shall

⁸ *Id.*

⁹ *Id.* (emphasis added).

¹⁰ *Id.* at 5.

¹¹ *Id.*

remain closed daily and be operated solely as an emergency exit equipped with functional Saint Paul Fire Safety approved crash/panic bar and alarm equipment from 6:00 p.m. until 6:00 a.m. the following calendar day. During this period no patrons, security personnel, employees, vendors or other parties may use the door for any purpose other than to exit in case of a life-safety emergency.

[License Condition No. 7:] Licensee will install, maintain, close and secure a gate or similar device to prohibit motor vehicle access to the parking lot located on the north side of Isabel Street West after business hours or whenever the establishment is closed.

[License Condition No. 8:] Licensee shall retain clearly identifiable security personnel. Clearly identifiable shall mean security personnel wearing identifiable and clearly marked uniform or outerwear. Security personnel shall be assigned to each entrance of the license premises from 9:00 p.m. until closing on Friday and Saturday and whenever entertainment, to include karaoke and disk jockey service, is provided. Security personnel shall 'wand' (using a functional metal detector) each patron and check all handbags and packages carried by patrons. The requirement to wand patrons includes those who are returning to the establishment. Security personnel shall verify the age of patrons by checking state or federally issued identification (ID) cards. Licensee shall establish and require that security personnel enforce a [']no picture ID, no entrance policy.['] Security personnel shall not allow alcoholic beverages to leave the service area of the licensed establishment.¹²

13. As part of an investigation of an assault, the St. Paul Police Department again requested, and received, copies of video recordings from the El Alamo surveillance system – this time for events on the evening of August 5, 2017.¹³

14. On September 6, 2017, the Department sent Mr. Erkenbrack a warning letter complaining of what it regarded as unlicensed "patron dancing" at El Alamo. As Mr. Hudek wrote in the letter:

The Entertainment Class 'A' license you currently hold for El Alamo Bar does not allow for patron dancing . . .

An Entertainment Class 'A' license only allows for amplified or non-amplified music and/or singing by performers without limitation as to number, and group singing participated in by patrons of the establishment.¹⁴

¹² *Id.* at 6.

¹³ Ex. 4.

¹⁴ Ex. 3.

15. The video recording from August 5, 2017 was not offered into the hearing record by either party.¹⁵

16. In the early morning hours of September 9, 2017, Saint Paul police officers responded to the El Alamo bar on a report that shots were being fired on Robert Street outside of the bar.¹⁶

17. During their investigation of the scene, police officers recovered 45 bullet casings that had been exchanged during the shooting. The gunmen engaged in a shoot-out in front of the entrance to El Alamo and the parking lot that is set aside for El Alamo patrons across Robert Street.¹⁷

18. Kristina Schweinler, a Senior Inspector with the Department requested a copy of the video recordings from the El Alamo surveillance system for September 8 and 9, 2017. City officials sought to review the period leading up to, and immediately following, the gunfire.¹⁸

19. City officials concluded that lapses by El Alamo's security staff had contributed to the outbreak of violence. In their view, El Alamo staff failed to routinely patrol and secure the bar's outdoor parking lot (see Condition No. 3), failed to prevent non-emergency patron entrance and egress from an emergency exit door that faced Isabel Street (see Condition No. 6), and failed to consistently subject patrons to security "wandering" and checks of handbags for weapons (see Condition No. 8).¹⁹

20. Likewise of concern, it appeared to city officials that notwithstanding the warning letter that was sent a few days before, El Alamo was again hosting dancing by bar patrons without first obtaining an Entertainment Class B license.²⁰

21. The surveillance video recording from September 8 and 9, 2017, shows a handful of patrons rhythmically swaying back and forth while El Alamo's disk jockey played music from a set of nearby turntables.²¹

22. The gunfire on September 9, also increased the focus on El Alamo's operations among the bar's neighbors. On September 21, 2017, the Department received a complaint that related back three weeks in time, to events that occurred on Friday, September 1, 2017. Specifically, the tipster complained that El Alamo patrons were using the door that faced Isabel Street for non-emergency entrance to, and egress from, the bar on that day.²²

23. To investigate the claimed violation of license Condition Number 6, the Department sent a letter to El Alamo on September 28, 2017. The letter requested a

¹⁵ See City's Amended Exhibit List.

¹⁶ Ex. 2; Test. of Lucas Lorenz.

¹⁷ *Id.*

¹⁸ Ex. 4.

¹⁹ See Exs. 5, 6, 7.

²⁰ Exs. 5, 6.

²¹ Ex. 5.

²² Ex. 8.

copy of the video surveillance recordings for the hours between 6:30 p.m. and 8:00 p.m. on September 1, 2017.²³

24. By way of a letter dated October 1, 2017, El Alamo informed the Department that it could not comply with the request. When it attempted to retrieve the video recordings from its system, staff discovered that its system was only recording ten days' worth of activities at the bar and not capturing the required 30 days' worth of activities. It was unable to access images of events on September 1, 2017.²⁴

25. In early October, El Alamo undertook a series of repairs and upgrades to its video surveillance system so as to assure compliance with the standards of Condition Number 1, relating to making, archiving and copying surveillance camera recordings.²⁵

26. On November 9, 2017, the city of St. Paul issued a Notice of Violation to El Alamo. In the Notice of Violation, the Department stated that it would recommend that the City Council upwardly depart from the presumptive penalty of \$1,000.00 for a second violation and instead assess a \$2,000 penalty and a 10-day suspension of El Alamo's liquor and business licenses.²⁶

27. El Alamo made a timely appeal of the claimed violation, resulting in the referral for contested case proceedings.²⁷

Based upon the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the St. Paul City Council have authority to hear this matter pursuant to St. Paul Legislative Code § 310.05(c) (2017).

2. The hearing in this matter was conducted in accordance with the St. Paul Legislative Code § 310.05 (2017) and the contested case procedures of Minn. Stat. §§ 14.57-.62 (2016).

3. The City provided proper notice of the hearing and fulfilled all procedural requirements of rule or law.

4. Because the City proposes regulatory discipline, it has the burden of proving by a preponderance of the evidence that action against El Alamo's licenses is appropriate.²⁸

²³ Ex. 9.

²⁴ Ex. 11.

²⁵ Ex. 10.

²⁶ Ex. 13.

²⁷ Ex. 14.

²⁸ Minn. R. 1400.7300, subp. 5 (2017).

5. Under the St. Paul Legislative Code, the St. Paul City Council has grounds to take adverse action against a City-issued license if the licensee violates a statute, ordinance, regulation or license condition related to the licensed activity.²⁹

6. The City demonstrated by a preponderance of the evidence that agents and staff of El Alamo violated the requirements of Saint Paul Legislative Code § 310.06 (b)(6)(a), by failing to adhere to the conditions upon El Alamo's liquor and business licenses.

7. The City demonstrated by a preponderance of the evidence that agents and staff of El Alamo failed to uphold the requirements of Conditions Number 1, 3, 6 and 8 of El Alamo's liquor and business licenses.

8. Section 411.02 of the Legislative Code clearly segments entertainment licenses into different classes based upon whether dancing will occur at licensed establishments and how much clothing is worn by the dancers during that activity. This section provides:

Any person desiring to provide entertainment on the licensed premises must obtain an entertainment license of the applicable type as hereinafter provided:

Class A — Amplified or nonamplified music and/or singing by performers without limitation as to number, and group singing participated in by patrons of the establishment.

Class B — All activities allowed in Class A, plus dancing by patrons to live, taped or electronically produced music, and which may also permit volleyball and broomball participated in by patrons or guests of the licensed establishment plus stage shows, theater, and contests. In all of the activities in Classes A and B, all of the participants, including patrons, shall be fully clothed at all times.

Class C — All activities allowed in Classes A and B, plus performance by male or female performers without limitation as to number, where clothing is minimal but in compliance with Chapters 409.09 and 410.05 of the Legislative Code.³⁰

9. The Legislative Code defines a "public dance hall" as a "room, place or space open to general public patronage in which is carried on dancing wherein the public may participate, whether or not a charge for admission for dancing is made . . ."³¹

10. Significantly, the Legislative Code includes an exemption from the requirement to obtain a dance hall license for holders of on-sale intoxicating liquor licenses. Section 405.01(a) of the Code provides:

²⁹ St. Paul Leg. Code § 310.06(a), (b)(5), (b)(6)(a) (2017).

³⁰ St. Paul Leg. Code § 411.02 (2017).

³¹ St. Paul Leg. Code § 405.01 (b) (2017).

No person shall operate a public dance or rental hall in Saint Paul without a license. Notwithstanding the foregoing, no license shall be required under this chapter (i) if the person proposing to operate the dance or rental hall already has an on-sale intoxicating liquor, restaurant, hotel or motel, or entertainment license for the premises at which the dance or rent activities would take place . . .³²

11. The City did not demonstrate by a preponderance of the evidence that El Alamo either promoted dancing among patrons, held itself out to the public as a dance hall, or specially-provided spaces for its patrons to dance, in violation of the limitations of its Entertainment Class A license. Further, section 405.01(a) arguably exempts El Alamo from the requirement to separately obtain an Entertainment Class B license before it may host dancing at the Robert Street site. Under such circumstances, finding a regulatory violation of El Alamo's Entertainment license would be unfair, unjust and at odds with the hearing record.

12. The penalty matrix of the St. Paul Legislative Code includes presumptive penalties for particular code violations. For example, the penalty matrix used by the City Council includes a presumptive penalty of \$500 for a first violation of the Legislative Code relating to licensed activity³³

13. The Legislative Code also provides that multiple violations of regulatory requirements may provide a basis for the City Council to move beyond the presumptive penalty specified in section 310.05 (m), and impose a more significant sanction.³⁴

14. The number of serious and recent failures to abide by El Alamo's licensing conditions provide "substantial and compelling reasons," as those terms are used in section 310.05 (m) of the Legislative Code, for an upward departure beyond the presumptive penalty of \$1,000.³⁵

Based upon the Conclusions of Law, and for the reasons explained in the attached Memorandum, the Administrative Law Judge makes the following:

³² St. Paul Leg. Code § 405.01 (a) (2017).

³³ St. Paul Leg. Code § 310.05(m).

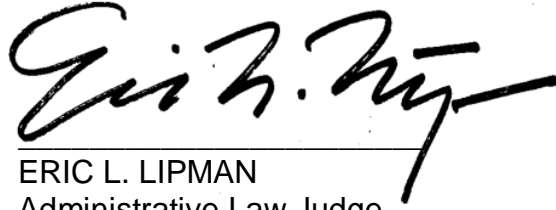
³⁴ *Id.*

³⁵ *See id.*

RECOMMENDATION

The St. Paul City Council should take appropriate action against the licenses held by El Alamo for the premises at 429 Robert Street South in Saint Paul, Minnesota.

Dated: January 8, 2018



ERIC L. LIPMAN
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Saint Paul City Council will make a final decision after a review of the record and may adopt, reject, or modify these Findings of Fact, Conclusions of Law, and Recommendation. Pursuant to Saint Paul Legislative Code § 310.05 (c-1) (2017), the City Council shall not make a final decision until the parties have had the opportunity to present oral or written arguments to the City Council. Parties should contact Shari Moore, City Clerk, City of Saint Paul, 310 City Hall, 15 W. Kellogg Blvd., Saint Paul, Minnesota 55102, to ascertain the procedure for filing exceptions or presenting arguments.

MEMORANDUM

The parties diverge on two key points in the hearing record; whether: (a) the joyful swaying back and forth of a few El Alamo customers on the evening of Friday, September 8, 2017, signifies operation of an unlicensed dance hall; and (b) the fine and suspension period proposed by the Department is proportional to El Alamo's failures to meet the conditions of its licenses.

As to the first question, it is clear from a review of the surveillance video footage that El Alamo was not holding itself out to the public as a dance hall. The patrons who were swaying in time with the music on that evening were crammed between tables and chairs. If some patrons stepped in time with the music, it was episodic and very individualized. The "dancing" was not a collective activity, or an activity facilitated by El Alamo, in any sense of those words.

Likewise important, the context, structure and provisions of the entertainment ordinance makes clear that not every shake, shimmy or swing step by a bar patron obliges the bar owner to obtain an Entertainment Class B license. The ordinance itself properly focuses on the impacts that would likely follow from different types of uses. The ordinance segregates these activities along a continuum based upon the intensity of those uses: At the lowest end of this spectrum is "amplified music" and "group singing participated in by patrons;" a more intense set of uses, in the middle category, is "dancing by patrons," "volleyball and broomball participated in by patrons" and "stage

shows, theater, and contests;” followed by a still more intense use – performances “by male or female performers without limitation as to number, where clothing is minimal . . .”³⁶

The activities in the middle category all imply moderately-intense group activities as to which large, clear spaces are customarily set-aside: volleyball, broomball, stage shows, theatrical productions and contests. The dancing that is similar in its intensity and impact to a volleyball match, a stage show or a theater production, is the kind of dancing that occurs on dance floors, in discotheques and night clubs; not by people swaying between a corner table and the bar. Indeed, viewed through the prism of the categories in Section 411.02, the “dance moves” made by a few of the patrons on Friday, September 8 were no more intense a use of the premises than if El Alamo had hosted “group singing” instead.³⁷

Lastly, as noted above, it is arguable that the requirement to obtain an Entertainment Class B license applies only to the would-be dance hall operators that do not already hold an on-sale liquor license. The regulators at the Department do not read the ordinances in this way, to be sure; but both the law and the facts underlying the Department’s claim are sufficiently shaky that the City Council should not base any regulatory discipline of El Alamo on this ground.

With that said, there were a series of other regulatory violations at El Alamo in September and October of 2017. These violations were more significant, close in time, and require a robust response from El Alamo’s management.

The Department describes this enforcement action as its effort to deliver a “wake up call.” In that characterization the Department is right. While a 10-day suspension of El Alamo’s operations would, undoubtedly, be a stinging punishment, it is the regulatory choice that is most likely to focus the bar’s management on the need to significantly improve controls over the doorways to the bar and the activities in the accompanying parking lot. It is far less likely that the next presumptive step in the penalty matrix – a \$1,000 fine – would have the same focusing effect. The hearing record thus includes “substantial and compelling reasons” for an upward departure beyond the presumptive penalty of \$1,000.³⁸

E. L. L.

³⁶ St. Paul Leg. Code § 411.02 (2017).

³⁷ *See id.*; Ex. 7.

³⁸ *See id.*